Montana administrative law, and in no way turned on the constitutional validity of the cyanide heap-leach mining ban. Thus, as a matter of law, the reason petitioners lost their state mineral leases was their abandonment of the lease permitting process, not the passage or application of the cyanide mining ban. In light of the Montana courts' state-law based holding that the leases were properly terminated because of petitioners' failure to take required steps in the permitting process, the question whether the application of the mining ban to those leases would constitute a taking or a Contract Clause violation if the leases were otherwise still valid is a purely abstract and theoretical one, with no effect on whether petitioners were unlawfully deprived of property when they lost the leases.

Nothing in the Montana court's discussion of the lease termination issue refers to any principles of federal law, let alone federal constitutional law. Thus, the holding that the agency properly found that the leases could be terminated is an "independent" state-law ground of decision, in the sense that it is not "interwoven with the federal law" within the meaning of *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). *See also California v. Freeman*, 488 U.S. 1311, 1314-15 (1989) (O'Connor, J., in chambers) (noting that where a state court's discussion of federal constitutional principles was "strictly confined" to a section of its opinion that was separate from the section that resolved a state-law issue, the state-law ruling was independent of federal law).

The state-law lease termination ruling is also "adequate" to support the judgment of the Montana Supreme Court because it depends neither on the existence nor the constitutionality of the heap-leach mining ban, and thus renders irrelevant whether the ban would otherwise constitute a taking or impairment of the mineral leases. Such a state-law ground for a state court ruling bars review by this Court, even if the state court has also addressed issues of federal law that are not essential to support its judgment:

> This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. ... In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. *See Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

Coleman v. Thompson, 501 U.S. 722, 729 (1991).

Here, any discussion of whether the mining ban *would have* constituted a taking of petitioners' mineral leases, or *would have* unlawfully impaired them under the Contract Clause, would be an advisory opinion, because those leases were properly terminated under state law for reasons independent of the existence or constitutionality of the mining ban. The Court therefore lacks jurisdiction over the petitioners' constitutional claims concerning the impact of the mining ban on the leases. Moreover, even if the Montana court's lease termination holding somehow fell short of the requirements of the independent and adequate state ground doctrine, the existence of this additional holding below, coupled with petitioners' failure either to challenge it or explain how it would not result in the same result regardless of this Court's ruling on the constitutional questions they present, would still weigh heavily against discretionary review of this case.

II. Petitioners Present No Compelling Basis for Review of the Montana Supreme Court's Takings Analysis.

Petitioners acknowledge that they raised no federal constitutional claims before the Supreme Court of Montana, and that court's discussion of petitioners' takings claim contains no statement that it is deciding an issue of federal law. In this respect, the case is unlike *Michigan v. Long* and most of this Court's recent decisions addressing the independent and adequate state ground doctrine, where state courts expressly stated that they were deciding both state and federal constitutional questions, and the issue was whether the state-law holding was independent of the court's interpretation of federal law. *See Long*, 463 U.S. at 1037 n.3; *see generally* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* ch. 3.24 at 202-07 (8th ed. 2002). Assuming for the sake of argument, however, that the Montana court's opinion should be read as deciding a federal takings claim because of its citation of federal takings case law, *cf. New York v. Class*, 475 U.S. 106 (1986), petitioners' arguments that this Court should review the Montana court's rejection of their takings claim remain unpersuasive.

Petitioners chide the Montana Supreme Court for focusing on their arguments concerning the state mineral leases and "ignoring" any takings claim based on such "traditional property interests" as "privately-owned real property (fee interests in surface estates)" and "separate ownership of underlying minerals." Pet. 8. But when a state court *ignores* a federal claim that a litigant has *expressly declined to raise*, there is no federal issue for this Court to review under even the most expansive readings of such decisions as *Michigan v. Long* and *New York v. Class*. This Court may have jurisdiction to entertain any federal issues *actually resolved* by the Montana Supreme Court even though petitioners never raised such issues (*see* Pet. 6, n.1), but it will not address federal

issues that were neither raised nor decided in that court. *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997).[3]

In any event, the reason the state court focused its takings analysis on whether petitioners had a property interest in the opportunity to apply for a mining permit to work their state mineral leases was that *that was the takings question petitioners asked it to decide*. The state court's opinion clearly reflects the court's understanding that the opportunity to apply for a permit was the interest that the petitioners claimed was taken. *See* 114 P.3d at 1016 ("The Venture emphasizes that it is not contending that it had a vested right to mine with cyanide, but that it had a property right in 'the opportunity for a favorable ruling on its mining permit application' which existed prior to the passage of I-137."). Petitioners' briefs in the state court bear out the court's understanding that petitioners' argument was that "the property interest actually taken by I-137" was "the *opportunity* for a favorable ruling on its application to conduct that type of mining." Appellants' Reply Br. 3; *see also* Appellants' Initial Br. 20-23. The Montana court rejected petitioners' argument because its analysis of the applicable regulatory scheme even *before* passage of the cyanide mining ban demonstrated that the state had such wide discretion to deny a permit that the mere opportunity to apply for a permit did not rise to the level of a property interest protected against a taking under Montana's constitution. 114 P.3d at 1017-19.

Petitioners make no effort to demonstrate that the Montana's court's analysis of the regulatory framework that de-

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[3] As noted above, the issue petitioners *did* raise on appeal about property interests other than the state mineral leases (such as fee interests and private mineral leases) was that a remand was required under principles of Montana state law because the trial court had failed to explain its reasons for rejecting claims based on those interests. The Montana Supreme Court held that this state-law procedural argument failed because the trial court had stated reasons for its holding. 114 P.3d at 1020.

fined their "opportunity" to obtain a permit was erroneous, and even if they did, the correctness of such a fact-bound ruling is not an issue meriting exercise of this Court's certiorari jurisdiction. Petitioners instead argue that the state court erred by not defining their claimed property interest differently from the way they defined it in their own briefs to that court. Even if their arguments had merit, this Court does not sit to correct errors by state courts, especially not when the claimed errors resulted from the petitioners' own failure clearly to present the arguments they now advance.

Recognizing that a mere claim of error is not enough, petitioners also attempt to argue that the Montana court's analysis conflicts with that of federal appellate courts, but the conflicts they allege are illusory.

First, petitioners claim that the Montana Supreme Court's opinion "mistakenly cited case law that reveals conflicts among federal appeals courts." Pet. 11. Specifically, petitioners point out that the opinion below cites a prior Montana decision, *Kiely Construction, L.L.C. v. City of Red Lodge*, 57 P.3d 836 (Mt. 2002), which in turn cited "several federal appellate cases." Pet. 11. Those cases, according to an opinion of the D.C. Circuit, *George Washington University v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003), take a "different approac[h]" from a decision of the Third Circuit, *DeBlasio v. Zoning Board*, 53 F.3d 592 (3d Cir. 1995).

The "different approaches" referred to by the D.C. Circuit in *George Washington University* relate to the issue of how to characterize a plaintiff's claimed property interest in a *substantive due process* challenge to zoning regulations—an issue not presented here. Thus, petitioners' claim of a conflict boils down to the assertion that the Montana court cited a case that cites other cases that (arguably) take "different approaches" to an issue not presented here. That is hardly the type of conflict that this Court exercises its certiorari jurisdiction to resolve. *See* S. Ct. R. 10(b) (Court will consider exercising jurisdiction when "a state court of last resort has de-

cided an important federal question in a way that conflicts with the decision ... of a United States court of appeals").

Second, on a less ethereal level, petitioners argue that the decision below conflicts with the Federal Circuit's decision in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). *United Nuclear*, however, differs from this case in a number of critical respects. The issue in *United Nuclear* was superficially similar to the issue here: whether United Nuclear's mineral leases on an Indian reservation were taken when the Secretary of the Interior denied it a permit to conduct uranium mining operations. The reason for the permit denial was that the Indian tribe (which had originally agreed to the leases) would not agree to allow mining unless the company made additional payments not called for by the leases. However, the leases provided that United Nuclear was only required to obtain the *Secretary*'s approval and to comply with regulations officially promulgated by the Secretary. It was undisputed that United Nuclear complied with all regulatory requirements for approval of its mining operations by the Secretary, and that *tribal* approval had never previously been required by the Secretary and was still not required by any applicable regulations. Under those circumstances, the court held that the denial of a permit for reasons that United Nuclear could not have contemplated when it entered into the leases was an interference with its legitimate, investment-backed expectations significant enough to constitute a regulatory taking.

Here, by contrast, the court found that even absent the cyanide mining ban, the state could have denied a permit for any number of reasons, rendering any expectation of obtaining a permit much more speculative than in *United Nuclear*. In addition, the mineral leases in this case provided that they would be subject to any and all applicable state environmental protection laws and regulations. The cyanide mining ban is such a law, unlike the extra-legal requirement of tribal approval at issue in *United Nuclear*.

Perhaps most importantly, in light of petitioners' criticism of the Montana court's characterization of the alleged property interest at issue in this case as being only the opportunity to seek a permit to exploit the mineral leases (rather than the leases themselves), the court in *United Nuclear* characterized the interest at issue there in precisely the same way: the property taken was "'not the leases,' but United Nuclear's 'expectation that it would be permitted by defendant to engage in mining the leased tract.'" 912 F.2d at 1436. The difference between the two cases is thus not their basic analytic approach; rather, it is that the plaintiff's expectations were reasonable enough to constitute a protected property interest on the particular facts in *United Nuclear*, while petitioners' expectations were not similarly well-grounded on the facts of this case.

Finally, petitioners argue that the Court's recent decision in *San Remo Hotel v. City & County of San Francisco*, 125 S. Ct. 2491 (2005), renders their challenge to the Montana court's holding somehow more worthy of review here than it would have been before *San Remo*. *San Remo* may well be fatal to petitioners' effort to split their cause of action and reserve federal constitutional claims for later litigation in federal court. But *San Remo*'s holding that conventional claim and issue preclusion principles apply in takings litigation does not transform claims otherwise unsuitable for this Court's review into certworthy issues. That petitioners may have no opportunity to present meritless claims to a federal court later does not mean this Court should hear them now.

III. Petitioners' Challenge to the Montana Supreme Court's Application of the Montana Constitution's Contract Clause Does Not Merit Reivew.

The Montana Supreme Court held that the cyanide heap-leach mining ban did not violate Montana's constitutional prohibition on impairment of contracts because it served significant and legitimate state interests, and its adjustment of contractual rights was a reasonable means of promoting those

interests. 114 P.3d at 1023-24. Reviewing the evidence in the record concerning the environmental impact of cyanide heap-leach mining, the court concluded:

> In consideration of the acknowledged risks associated with the use of cyanide heap leaching, and the expressed concerns about the inadequacy of existing laws, we conclude that the State could legitimately determine that this method of mining required strict regulation, and that I-137 was reasonably related to that legitimate purpose.

Id. at 1024.

This Court lacks jurisdiction to review the Montana court's state constitutional law ruling. *Murdock v. Memphis*, 87 U.S. 590 (1874). Petitioners' assertion that, under *New York v. Class*, 475 U.S. at 109, the Montana court's Contract Clause decision rests on federal constitutional grounds is erroneous. Unlike the state court decision in *Class*, which mentioned the state constitution only once and relied interchangeably on federal and state case law *(see id.)*, the Montana court's impairment-of-contract analysis relied principally on state-court decisions construing Montana's own Contract Clause, and it cited federal decisions mostly in passing or in footnotes. *See* 114 P.3d at 1020-24. Thus, the Montana court's decision here does not "fairly appea[r] to rest primarily on federal law, or to be interwoven with the federal law." *Michigan v. Long*, 463 U.S. at 1040. Although the court noted that Montana's Contract Clause is "simila[r]" to the Contract Clause of the U.S. Constitution, *id.* at 1020, nowhere did the court indicate (as did the Michigan Supreme Court in *Michigan v. Long*) that it was issuing a holding on a federal as well as a state constitutional challenge. *See Long*, 463 U.S. at 1037 n.3. Moreover, in this case the Montana Supreme Court, unlike the Michigan court in *Long* and the New York court in *Class*, "ma[de] clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves

compel the result that the court has reached." *Long*, 463 U.S. at 1041; *see* 114 P.3d at 1021 n.16 (stating that court relies on federal Contract Clause precedents for "guidance regarding our Contracts Clause analysis").

Even if the Montana court's opinion could be construed as deciding a federal Contract Clause issue, review would plainly be unwarranted. The state-law standard applied by the Montana court is completely consistent with the federal constitutional standard set forth by this Court in *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410-13 (1983), and petitioners do not contest that, under that standard, the Montana law at issue reasonably serves significant and legitimate state interests.

Instead, petitioners argue that the Montana court should have applied "heightened scrutiny" to the statute under this Court's ruling in *United States Trust Co. v. New Jersey*, 431 U.S. 1, because the state was a party to the contracts at issue—that is, the state mineral leases. But *United States Trust* holds only that heightened scrutiny applies when a state impairs its "*own financial obligations*." *Id.* at 25 (emphasis added). The reason for that holding, this Court explained, was that "[a] governmental entity can always find a use for extra money," and thus "[i]f a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Claus would provide no protection at all." *Id.* at 26.

As the Montana court correctly noted (in rejecting application of heightened scrutiny under the state's own Contract Clause), these considerations are wholly inapplicable to a law that is not targeted at state financial obligations at all, and that in fact has an *adverse* effect on the state's pecuniary interests. As the court explained (*id.* at 1023):

> [T]he record reveals that the application of I-137—created and passed by the voters of Montana—did not act to benefit the State's self-interest. The passage of I-137 caused the State to forego the opportunity to re-

> ceive royalty payments estimated at $5 million annually over the production life of mining operation[s], which was expected to be twelve years. Thus, though the State was a party to the contract, its interests as a contracting entity were actually diminished by I-137's passage, and thus, for purposes of a Contracts Clause analysis, it is not necessary to apply a heightened level of scrutiny to the Initiative.

Petitioners contend that whether *U.S. Trust*'s heightened scrutiny is limited to impairment of contracts that serve a state's pecuniary interests is a question that merits this Court's attention, but they concede that they have been able to locate only two federal decisions that address the issue, both of which "have held, like the Montana Supreme Court, that the need for heightened scrutiny under *United States Trust* is limited to cases in which a State is seeking to further its 'financial' or 'pecuniary' self-interest." Pet. 18 (citing *Mercado-Boneta v. Administracion del Fondo de Compensacion*, 125 F.3d 9, 16 (1st Cir. 1997); *Linton v. Commissioner*, 65 F.3d 508, 519 (6th Cir. 1995). Given the acknowledged agreement of the courts in the very small number of cases in which the issue has arisen, the exercise of this Court's certiorari jurisdiction is hardly necessary. Should a conflict arise over the issue—in a case that presents it as a matter of federal rather than state constitutional law—there will be ample opportunity for this Court to resolve it then.

In any event, petitioners' arguments for their position on the merits are extremely weak. Petitioners assert that the need for heightened scrutiny reflects not only concern over the state's self-interest, but also the need "to maintain the credit of public debtors." Pet. 17 (citing *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 n. 24 (1985)). That is simply a non sequitur: The interest in maintaining the credit of public debtors is implicated when (as in *U.S. Trust*) a state seeks to excuse itself from its *financial obligations*. That interest in no way suggests a need for

heightened scrutiny of generally applicable environmental regulations that do not involve efforts by the state to avoid obligations to creditors.

Petitioners further rely on a portion of what they describe as the plurality opinion in *United States v. Winstar Corp.*, 518 U.S. 839, 896 (1996), stating that "when we speak of governmental 'self-interest,' we simply mean to identify instances in which the Government seeks to shift the costs of meeting its legitimate public responsibilities to private parties."[4] The statement petitioners cite, however, did not involve the Contract Clause, let alone the issue of heightened scrutiny under *U.S. Trust*; rather, it concerned the applicability of the "sovereign acts doctrine" to a breach of contract claim against the United States, a different matter altogether.[5] Petitioners' out-of-context quotation from *Winstar* does nothing to advance their assertion that the heightened scrutiny issue merits review by this Court.

Beyond their misplaced reliance on *Winstar*, petitioners offer nothing but generalizations quoted from a handful of law review notes and treatises. Suffice it to say that these sources hardly constitute an important reason for this Court to consider petitioners' request that it expand the scope of heightened scrutiny under *U.S. Trust* to cases where a state is not abrogating contracts for its own pecuniary benefit.

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[4] The cited passage of *Winstar* was not in fact the plurality opinion. Unlike the rest of Justice Souter's opinion, which reflected the views of four Justices, the passage on which petitioners rely carried only three votes: those of Justices Souter, Stevens, and Breyer.

[5] Moreover, even if the "sovereign acts" doctrine could somehow be correlated with the circumstances under which *U.S. Trust* would call for heightened scrutiny under the Contract Clause, it appears that the three Justices who joined the cited portion of *Winstar* would recognize that Montana's cyanide heap-leach mining ban, unlike the statute in *Winstar*, qualifies as a "public and general" law because it applies equally to public and private contracts and was not specifically aimed at abrogating state contractual obligations. *See Winstar*, 518 U.S. at 896-903.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Date: January 2006

No. 05-588

IN THE

Supreme Court of the United States

SEVEN UP PETE VENTURE, an Arizona General Partnership, d/b/a SEVEN UP PETE JOINT VENTURE, CANYON RESOURCES CORPORATION, a Delaware Corporation, JEAN MUIR, DR. IRENE HUNTER, DAVID MUIR, ALICE CANFIELD, TONY PALAORO, JUNE E. ROTHE-BARNESON, AMAZON MINING COMPANY, a Montana Partnership, PAUL ANTONIOLI, STEPHEN ANTONIOLI, and JAMES E. HOSKINS,

Petitioners,

v.

THE STATE OF MONTANA,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY STATEMENT

The responses of the State of Montana ("State") and the intervenor groups ("Intervenors") only underscore the need for this Court's review. This case should have been a straightforward one. But, to avoid exposing the State to a large potential liability, the Montana Supreme Court eschewed a straightforward analysis of this Court's Takings and Contracts Clause precedents. The Montana court's analysis contradicts this Court's clear teachings, mistakenly infuses a conflicting line of federal appeals courts decisions, and directly conflicts with *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990).

The key facts are undisputed. Petitioners owned various types of property within Montana: state mineral leases, private leases, and realty interests. Pet. App. 4a-5a ¶ 8. Those properties once were worth hundreds of millions of dollars because there was an economically viable means of extracting the underlying gold and silver deposits. An unforeseeable initiative law (I-137) rendered these properties worthless by eliminating the prior opportunity for the state agency to exercise its discretion to grant mining permits to Petitioners. The Montana Supreme Court denied that there had been a "total regulatory taking" under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030-32 (1992), holding that Petitioners never had any "property" interest. That holding is at odds not only with cases decided by this Court and federal appeals courts but also with the recognition later in the court's opinion that I-137 substantially impaired Petitioners' state contracts (themselves a type of constitutionally protected property). The court then compounded its constitutional error by declining to apply heightened Contracts Clause scrutiny to the State's impairment of its own contracts.

REPLY ARGUMENT

I. THE ISSUE OF WHETHER PETITIONERS HAD "PROPERTY" PROTECTED FROM UNCOMPENSATED TAKINGS WARRANTS THIS COURT'S REVIEW.

Respondents, by continuing to obfuscate the relevant property interests, highlight the confusion and errors infecting the Montana Supreme Court's holding that Petitioners had no constitutionally protected property. That holding contradicts this Court's cases, relies on an inapposite line of divided federal appeals court decisions, and conflicts with an indistinguishable Federal Circuit decision.

A. This Case Squarely Raises The Issue Whether Leases And Real Estate Providing An Opportunity For Productive Economic Use Are Constitutionally Protected Property.

The petition demonstrated that Petitioners' leases and real estate are constitutionally protected "property." Pet. 8 (citing cases). What gave this property value was the opportunity to seek permission to recover the underlying gold and silver deposits in an economically viable manner. That opportunity, which existed before but not after I-137, not only made Petitioners' leases and real estate valuable but was itself a property interest. *See* Pet. 9 (citing cases).[1]

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[1] Contrary to the State's mischaracterization, Petitioners are not claiming nor are they required to show that they had "a vested right to mine using the cyanide heap-leaching process" (State Resp. 8). What Petitioners once had and what I-137 eliminated was the opportunity for the State to exercise independent discretion to decide whether or not Petitioners' proposed mining projects satisfied the preexisting permit standards. I-137 took away that opportunity (which itself was a property interest) and thereby rendered worthless Petitioners' previously valuable land and leases. By so doing, I-137 caused a total regulatory taking.

Respondents defend the Montana Supreme Court's holding by ignoring Petitioners' leases and real estate that were rendered worthless by I-137. Thus, the State distorts Petitioners' claim by writing that "Petitioners acknowledge that the property at issue is neither land nor leases, but 'an opportunity for mining permits' on the land under the leases." State Resp. 8. Contrary to the State's attempt to redefine the case, Petitioners unambiguously stated the question presented as: "Whether real property interests and State Mineral Leases, which carried with them an opportunity to seek a mining permit, are 'property' protected under the Takings Clause." Pet. i.

The property interests identified in the Petition are precisely those Petitioners identified in the state courts. The Montana Supreme Court recognized that Petitioners' holdings included leases as well as realty – all of which were "affected by I-137." Pet. App. 4a-5a ¶ 8. Petitioners alleged that I-137 caused a total regulatory taking by precluding the only economically beneficial use of these properties. *See* Pet. App. 67a, 85a-88a. Petitioners reiterated on appeal that their property consisted of state and private leases as well as "fee ownership of real property (including ownership of both surface and mineral estates)." Appellants' Br. 1-2, 11-12, 41-42. Indeed, they argued that the district court had erred by not addressing these other property interests. *See* Pet. App. 19a-20a ¶¶ 36-37. The State responded that "[t]he same reasoning and analysis" applies to all interests. Appellee Br. 33-35. The Montana Supreme Court held that Petitioners had no protected property because there was no assurance of permits. Pet. App. 18a-19a ¶¶ 32-34.

Respondents next suggest that Petitioners lost their state leases for reasons independent of I-137 (State Resp. 9-10) and that the Montana Supreme Court therefore issued an "advisory opinion" on the takings claim (Intervenors' Resp. 9). These suggestions are baseless. The Montana Supreme

Court "do[es] not issue advisory opinions." *Bitterroot River Protective Ass'n v. Siebel*, 326 Mont. 241, 246, 108 P.3d 518, 521 (2005) (citing cases). That court did and had to address the merits of the takings claims because I-137 indisputably rendered the state leases (not to mention Petitioners' other holdings) worthless.[2]

B. The Montana Supreme Court's Holding That There Was No Constitutionally Protected Property Contradicts This Court's Teachings.

The petition demonstrated that a new state law categorically precluding the only economically viable use of property (here, leases and realty) would constitute a total regulatory taking under this Court's case law. *See* Pet. 9 (quoting holding in *Lucas*, 505 U.S. at 1015, that a "statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land"). Indeed, the present case is controlled by the "watershed decision" (*Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2081 (2005)) in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). Justice Holmes' opinion for the Court in *Mahon* held that a state law "mak[ing] it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414-15.

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[2] Respondents seek to blur this point by injecting the separate issue of whether the leases should have been administratively extended pending judicial review. While the court held that the agency had no obligation to extend the state leases past 2000 (Pet. App. 32a-36a ¶¶ 56-65), there was no dispute that the 1998 enactment of I-137 rendered those leases worthless. By the time the leases expired in 2000, Petitioners had paid all past due administrative fees in order to preclude any argument that they lost the leases for reasons other than I-137. *See* Pet. App. 34a ¶ 61. The failure to complete other administrative steps, such as "obtain[ing] a final permit" or "propos[ing] an alternate legal method of gold recovery" (*id.* ¶ 62), was the direct result of I-137 outlawing the only economically viable mining method.

The State responds that "[t]here can be no compensable taking 'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" State Resp. 8 (quoting *Lucas*, 505 U.S. at 1027). That does not help the State because, as the Montana Supreme Court recognized, the newly-proscribed use here "has always been legal in Montana" (Pet. App. 25a ¶ 44). Intervenors' lengthy discussion of the alleged safety risks associated with this type of mining (Intervenors' Resp. 2-4) ignores the Montana Supreme Court's further recognition that "cyanide heap leaching has been shown to be safer than other methods" of mining. Pet. App. 27a ¶ 48.[3]

The key point under *Lucas*, regardless of whether cyanide heap leach mining is dangerous or actually "safer than other methods" (Pet. App. 27a ¶ 48), is that it indisputably was lawful before I-137. Indeed, this mining method remains lawful in Montana even today for mines operating before 1998. Pet. App. 7a ¶ 14. Thus, the State cannot show that the "use of [Petitioners'] properties for what are now expressly prohibited purposes was *always* unlawful" (*Lucas*, 505 U.S. at 1030, emphasis in original).

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[3] Intervenors make other incorrect factual claims. For example, they erroneously claim that "[c]yanide heap leach mining is a relatively recent invention." Intervenors' Resp. 2. In fact, "[s]urface mining of gold-bearing ores, combined with cyanide leaching of the ore to recover the gold, has been a lawful, highly productive activity in the State of Montana, from approximately 1900 until the passage of Initiative 137 in November, 1998." Pet. Am. Compl. p. 6, ¶ 29; *see also* Pet. App. 44a-45a (district court's citation of this same complaint paragraph for point that "since at least 1970, the use of cyanide with respect to the processing of ores has been subject to various regulations in the state of Montana"). Intervenors' claim is also at odds with the Montana Supreme Court as to an historical fact well known to those state justices. That court, citing "Montana's long association with mining," wrote that "mining based upon cyanide heap leaching has always been legal in Montana, and, in fact, the country at large." Pet. App. 25a ¶ 44.

Respondents seek to shift the focus from whether Petitioners' holdings (which before 1-137 provided an opportunity for economically beneficial use) were property to whether mining permits themselves are property. The prior permit system, however, cannot excuse from the just compensation requirement a new categorical ban that ensures Petitioners' holdings will have no economically viable use. *See* Pet. 10 (discussing *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), and other cases ignored by Respondents).

C. The Montana Supreme Court's Holding Also Conflicts With Federal Appellate Decisions.

1. The Court Cited Federal Appellate Cases That Conflict Regarding Whether The Constitutional Focus Should Be On A Permit Rather Than On The Existing Property.

The Montana Supreme Court expressly grounded its holding upon the reasoning of *Gardner v. City of Baltimore*, 969 F.2d 63, 68 (4th Cir. 1992). *See* Pet. App. 13a-14a ¶ 28 (citing *Gardner* and a prior Montana Supreme Court decision that also cited *Gardner*). The petition demonstrated that *Gardner* was one of a series of federal appellate decisions that conflict regarding whether and when the constitutional focus should be on the sought-after permit or the existing property. *See* Pet. 11-13 (citing and discussing cases).

Respondents do not dispute the existence of an intercircuit conflict worthy of this Court's ultimate review. Instead, they claim that the conflict "relate[s] to the issue of how to characterize a plaintiff's claimed property interest in a *substantive due process* challenge to zoning regulations – an issue not presented here." Intervenors' Resp.12 (emphasis in original); *see also* State Resp. 10. That distinction only confirms Petitioners' point that the Montana Supreme Court erred by extending a conflicting line of federal appellate

decisions to a takings case in which a new law categorically precluded any economically viable use of existing property. *See* Pet. 11-13. The Montana Supreme Court, however, saw the issue differently. It held that this case was controlled by the reasoning of *Gardner*, and thereby extended that line of conflicting federal cases. Respondents, who benefited from this extension of *Gardner*, should not now be allowed to avoid further review by denying that *Gardner* has any applicability.

2. The Decision Below Directly Conflicts With A Federal Circuit Decision In An Indistinguishable Mining Case.

The petition further showed (Pet. 12-13) that the holding directly conflicts with *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). Respondents concede that *United Nuclear* is "superficially similar" to this case (Intervenors' Resp. 13), but then try to distinguish it on its facts. State Resp. 10-11. Respondents' proposed distinctions are illusory; under the holding of *United Nuclear*, Petitioners plainly had property interests protected from uncompensated regulatory takings. The present case warrants certiorari under this Court's Rule 10(b) because "a state court of last resort has decided an important question of last resort in a way that conflicts with the decision ... of a United States court of appeals."

The *United Nuclear* holding – that the relevant property interest was the mining company's "leasehold interest in the minerals" and "not the mere expectation that [it] would be permitted to engage in mining" (912 F.2d at 1437) – is directly contrary to the decision below. Respondents not only misstate that holding but turn it on its head, claiming the Federal Circuit "characterized the interest at issue there in precisely the same way [as the Montana court characterized the interest here]: the property taken was

'not the leases, but United Nuclear's 'expectation that it would be permitted by defendant to engage in mining the leased tract.'" Intervenors' Resp. 14 (quoting 912 F.2d at 1436). The quoted passage, however, was itself quoting the *Claims Court's* reasoning. *See* 912 F.2d at 1436 (passage quoted by Respondents beginning with "The Claims Court held, however, ..."). The Federal Circuit opinion overturning the Claims Court explained that its identification of the relevant interest was "[c]ontrary to the ruling of the Claims Court." *Id.* at 1437.

Respondents offer irrelevant factual distinctions, but the facts of this case are even more compelling than *United Nuclear*. The key in both cases is that the government unforeseeably changed the rules long after mining leases were signed. The change there was "a new policy requiring tribal approval of mining plans." 912 F.2d at 1436. The Federal Circuit found, just like the Montana Supreme Court here, that provisions making the leases subject to future regulations could not "fairly [] be said to have anticipated" this new policy. *Id. Compare* Pet. App. 25a ¶ 44 (similar finding in this case). The distinction between the permitting process changes – a tribal approval requirement in *United Nuclear* rather than an absolute ban here – makes this an even more compelling case for finding a categorical taking. And, the fact that Petitioners "invested more than $70 million" in the projects (Pet. App. 23a ¶ 42) as compared to the $5 million invested in *United Nuclear* (912 F.2d at 1436), only heightens Petitioners' "investment-backed expectations" (*Lingle*, 125 S. Ct. at 2081-82; *Lucas*, 505 U.S. at 1019 n.8).[4]

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[4] The State's argument that compensation is unnecessary because I-137 was meant to protect the environment, State Resp. 11 (citing *Mugler v. Kansas*, 123 U.S. 623 (1887); *Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988)), lacks force because I-137 eliminated all value of Petitioners' property by precluding a previously-lawful use. *See Lucas*, 505 U.S. at 1026-32 & n. 13 (distinguishing *Mugler*).